Distr: General
19 March 2010

Original: English

International Seabed Authority Council
Sixteenth session
Kingston, Jamaica
26 April-7 May 2010

Review of outstanding issues with respect to the draft regulations on prospecting and exploration for polymetallic sulphides in the Area

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1. The purpose of the present paper is to provide members of the Council with a further update on the outstanding issues with respect to the draft regulations on prospecting and exploration for polymetallic sulphides in the Area (ISBA/15/C/WP.1/Rev.1) in preparation for continued discussion of the regulations during the sixteenth session of the Authority.

I. Background and progress to date

2. Members of the Council will recall that during the fifteenth session, the Council continued its detailed consideration of the draft regulations, which it had commenced at the thirteenth session, in 2007.

3. The Council carried out its deliberations on the basis of a revised text of the draft regulations prepared by the Secretariat, taking into account the discussions and proposals in the Council during the thirteenth and fourteenth sessions (ISBA/15/C/WP.1 and Corr.1). The Council also had before it a working paper prepared by the Secretariat containing a review of the outstanding issues with respect to the draft regulations as well as a number of suggested possible revisions (ISBA/15/C/WP.2). As a result of its discussions, the Council reached agreement on revisions to the following draft regulations: regulations 21, 28 and 45 (3), and to the following provisions of annex 4 to the draft regulations: section 17.3; section 21.1 bis; section 25.2.

4. At the conclusion of the session, the Secretariat issued a revised text of the draft regulations (ISBA/15/C/WP.1/Rev.1), incorporating the revisions on which agreement had been reached.

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II. Outstanding issues

5. The Council was not able to complete its consideration of proposed revisions to regulations 12 (5), and 23 dealing with, respectively, anti-monopoly and overlapping claims. It was agreed to continue discussion of these issues at the next session.

A. Anti-monopoly

1. Background

6. Members of the Council would also recall that in 2008 the Legal and Technical Commission had recommended the insertion of an anti-monopoly provision into the draft regulations on polymetallic sulphides and the draft regulations on cobalt-rich ferromanganese crusts. In his summary report to the Council, the Chairman of the Commission noted that the anti-monopoly provision contained in annex III to the 1982 United Nations Convention on the Law of the Sea ("the Convention") could not be applied effectively to either polymetallic sulphides or cobalt-rich crusts. In place of this provision, the Commission recommended that the regulations for both polymetallic sulphides and cobalt-rich crusts should prevent multiple applications by affiliated applicants in excess of the overall size limitations referred to in regulation 12 (i.e., 2,000 square kilometres in the case of cobalt-rich crusts and 10,000 square kilometres in the case of polymetallic sulphides). The suggested language, to be inserted as an additional paragraph in regulation 12, read as follows:

> "5. The total area covered by applications by affiliated applicants shall not exceed the limitations set out in paragraphs 2, 3 and 4 of this regulation. For the purposes of this regulation, an applicant is affiliated with another applicant if an applicant is directly or indirectly controlling, controlled by, or under common control with another applicant."

7. Although this issue was discussed extensively in the Council during the fifteenth session, no agreement could be reached. A number of informal drafting proposals were made, and following informal consultations coordinated by the delegation of India, were subsequently circulated in a conference room paper issued on 2 June 2009 (ISBA/15/C/CRP.3). The language contained in that document would have the effect of imposing a limit on the number and size of exploration contracts that could be held by affiliated entities, even if sponsored by different States, or under the sponsorship of a single State, even if held by different entities.

2. Analysis

8. There is nothing in the Convention or the 1994 Agreement that specifically prevents one member State (whether applying as a State party or a State enterprise) from making more than one application for a plan of work for exploration, whether for polymetallic nodules or for any other type of mineral resource. Likewise, there is nothing to prevent a natural or juridical person or a consortium from making more than one application. Unfortunately, however, the Convention is very unclear as to the maximum number of applications that may be made by any of the above entities or combinations of entities.

9. In the case of nodules, an anti-monopolization clause is found in the Convention, annex III, article 6 (3) (c). This provision has never been applied in practice, in part because of the decision to establish a pioneer investor regime under resolution II of the Third United Nations Conference on the Law of the Sea. Resolution II contains an implicit limitation on the number of plans of work for exploration that could be held, or could be sponsored by, individual States; that is to say a limit of one contract to each of the entities listed in paragraphs 1 (a) (i) to (iii). Even in this case, however, the practical effect of paragraph 1 (a) (ii) would have been to allow multiple applications by natural or juridical persons and combinations of such entities from a number of Western European States (although this did not in fact happen).

10. The pioneer regime came to an end with the entry into force of the Convention and the subsequent adoption by the Authority of the Regulations on Prospecting and Exploration for Polymetallic Nodules. As far as anti-monopolization is concerned, the Authority's Regulations follow the formula set out in annex III, article 6 (3) (c). The effect is that the only current limitation on the number of applications for exploration for polymetallic nodules that may be made or sponsored by a single State party (in whatever combination) is that set out at annex III, article 6 (3) (c), of the Convention, as reflected in the Regulations.

11. In the case of polymetallic sulphides, the Legal and Technical Commission decided at an early stage of their discussions on the subject that the limitations set out in annex III, article 6, could not apply. This was for two reasons: (a) the provision itself is explicitly applicable only to polymetallic nodules; and (b) the provision makes no practical sense from a scientific perspective if applied to sulphides. Accordingly, the Commission tried to develop an anti-monopoly provision which is fair and reasonable to all potential applicants. The Commission's proposal is reflected in draft regulation 12 (5) as set out in paragraph 6 above and is designed to place limits on multiple applications by "affiliated applicants", defined as applicants "directly or indirectly, controlling, controlled by, or under common control with another applicant". An affiliated applicant is defined as one which is "directly controlling, controlled by or under common control with another applicant".

12. During the discussions on this proposal in the Council, the question was raised as to exactly what the term "affiliated applicant" means; for example, in accordance with the Convention, in addition to the Enterprise, the entities eligible to apply for exploration in the Area include States parties, State enterprises, natural or judicial persons or any group of the foregoing. Can this be construed to say that, for a State member of the Authority, the entities eligible to apply for exploration is limited to one? The question relates to the meaning of the phrase "under common control", i.e., if "under common control" does not mean "under the control of the same State member of the Authority", it seems that more entities from the same member State could apply for the exploration contract. The real issue is whether the objective of the anti-monopolization clause is to prevent monopolization by a single applicant (regardless of whether it is a State, a State enterprise or individual), or whether the objective is to prevent monopolization by a single State member of the Authority?

13. Taking these considerations into account, the Council may wish to revisit the proposals that were made during the fifteenth session.

B. Overlapping claims

14. The other outstanding issue with respect to the draft regulations is the question of how to deal with the situation where two or more applications are made close together in time in relation to the same area (referred to as overlapping claims).

15. A preliminary discussion on this matter took place during the fourteenth session. It was recalled that, in the case of polymetallic nodules, it had not been necessary to make any provision in the regulations for overlapping claims since all overlapping claims to potential mine sites had in fact been dealt with under resolution II or by arrangements reached during the work of the Preparatory Commission. Any new applications made after the entry into force of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area would be considered strictly on a first-come, first-served basis.

16. In the case of polymetallic sulphides and cobalt-rich crusts, however, the Legal and Technical Commission had recognized that there was a possibility that, initially, applications may be submitted for overlapping areas. The Commission therefore considered it necessary to include in the draft regulations a procedure for resolving such claims on a fair and equitable basis, although the basic principle of the draft regulations remained that applications would be taken on a first-come, first-served basis.

17. Accordingly, the Commission proposed to apply a similar procedure to that found in resolution II. The Commission's proposal (draft regulation 21 (2) in the annex to document ISBA/13/C/WP.1) provided that, in the event of overlapping claims, the Secretary-General would notify the applicants before the matter was considered by the Council. Applicants would then have the opportunity to amend their claims so as to resolve any conflicts with respect to their applications. However, in the event of a conflict, the Council would then determine the area or areas to be allocated to each applicant on an equitable and non-discriminatory basis.

18. During the discussions at the fourteenth session, it became clear that most members of the Council did not agree with the proposal as formulated by the Legal and Technical Commission. In particular, it was generally considered inappropriate for the Council to be forced to make a choice between competing applications. A preference was expressed for a time period to be allowed during which competing applicants could determine between themselves the resolution of any overlaps, with the ultimate possibility of recourse to binding dispute settlement. Following an initial debate, an alternative proposal for a draft regulation 22 bis was prepared by the Secretariat (ISBA/14/C/CRP.2) and circulated on 2 June 2008. There was insufficient time to discuss that proposal in detail and several delegations asked for more time to consider the legal issues and precedents involved.

19. In the light of the discussions in 2008, the Secretariat prepared suggested language for a new regulation 23 for consideration by the Council at the fifteenth session (ISBA/15/C/WP.2, annex II). According to that formulation, an overlapping application submitted within a period of 60 days of an earlier application would have the effect of suspending further action on both (or all) applications until such time as any conflicts between applicants could be resolved. Since neither the Convention nor the 1994 Agreement provide a mechanism whereby either the Legal and Technical Commission or the Council could make a choice between competing

applications,[1] it was suggested that no further action should be taken on any such application until all conflicts in respect of such applications could be resolved. Competing applicants would be provided with an opportunity to resolve conflicts by negotiations. During this period, any such applicant may submit an amended claim. In the event that it was not possible to resolve overlapping claims by negotiation, it would be necessary to refer the claims to an appropriate form of dispute settlement. In this regard, the working paper prepared by the Secretariat (ISBA/15/C/WP.2) provided delegations with an analysis of the various options available, including the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration, as well as a discussion of the application of article 188 of the Convention.

20. Discussions on this matter took place during the fifteenth session and a number of formal and informal proposals were made. Much of the discussion took place in an informal open-ended working group chaired by New Zealand. While there was general agreement on some of the elements of draft regulation 23, there was no consensus on the overall text of draft regulation 23, in particular the question of how any dispute over overlapping claims would ultimately be resolved. On the other hand, there appeared to be general agreement on the relevance of the first-come, first-served principle, the idea that there should be a limited time period during which a subsequent application for the same area may be considered overlapping (although there were different views on how long this period should be), and the need for applicants with competing claims to the same area to resolve overlapping claims in a fair and equitable manner.

21. Given the nature of the discussions in 2009, the Secretariat is not in a position to propose any new language for draft regulation 23. Thus, the version of regulation 23 that appears in document ISBA/15/C/WP.1/Rev.1, as a basis for continued discussion by the Council, reflects merely the latest version of the text discussed in the Council in 2009. It is recognized that there is no consensus on the text.

III. Recommendations

22. The Council is invited to take note of the background to the draft regulations on prospecting and exploration for polymetallic sulphides in the Area and the summary of progress to date. With respect to the outstanding issues identified in the present paper, the Council is invited to address these issues during the sixteenth session with a view to adoption of the draft regulations.

23. In the event that the members of the Council are not able to agree on language for regulations 12 (5) and 23, one possibility that may be considered could be to remove these provisions from the draft regulations and incorporate their substance into a draft resolution to be proposed to the Assembly for adoption at the same time as the regulations. The advantage of that approach would be to recognize more explicitly that any problem of overlapping claims will arise only during a defined

[1] The power of the Council to approve a recommendation relating to a plan of work for exploration is strictly limited by the 1994 Agreement, section 3, paragraphs 11 and 12. There is no procedure for the approval of part of a plan of work or for the resolution of disputes by the Council.

period following adoption of the regulations. Once such period has expired, the first-come, first-served principle would apply in the same way that it applies in the case of polymetallic nodules. The problem of potential monopolization of the Area could also be addressed in a more flexible manner in this way. It may be noted that this approach would also be similar to the approach taken in respect to the pioneer investor regime under resolution II.